APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14257

LOCAL LODGE NO. 1424, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO; and INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 14324

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

BRYAN MANUFACTURING COMPANY, *Respondent*

On Petition to Review and Set Aside and on Petition to Enforce an Order of the National Labor Relations Board

Decided February 27, 1959

Mr. Bernard Dunau, with whom *Mr. Plato E. Papps* was on the brief, for petitioners in No. 14257.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, with whom *Messrs. Jerome D. Fenton*, General Counsel, National Labor Relations Board, *Thomas J. Dermott*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *William W. Watson*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 14257 and petitioner in No. 14324.

Mr. Frank L. Gallucci, with whom *Mr. Abraham Dobkin* was on the brief, for respondent in No. 14324. *Mr. Plato*

E. Papps also entered an appearance for respondent in No. 14324.

Before PRETTYMAN, *Chief Judge*, and FAHY and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge:* The Bryan Manufacturing Company (respondent in 14324), which then employed about 150 persons in its Reading, Michigan, plant received a letter in July 1954 from the International Association of Machinists advising that the Machinists represented "a majority of the 'production and maintenance' employees of your company." The Machinists sought a collective bargaining agreement.

In the proceedings from which this appeal arises it was found by the Trial Examiner and the Labor Board that the Machinists did not in fact represent a majority of the company's employees at that time, and this finding of no majority is not challenged here.[1] At the time the Company received the letter, Local 701, United Auto Workers, was engaged in organizing activities among Bryan employees at the Reading plant, but this was discontinued after the Company signed a collective bargaining agreement with the Machinists.

On August 10, 1954, the Company signed a contract with the Machinists without first seeing or seeking any evidence that the Union represented a majority of its employees. No employee authorization cards were shown to management representatives, no election was held, and the Company made no independent inquiry as to the desires of its employees. The August 10, 1954 contract contained

[1] At the hearing on the complaint before the Trial Examiner thirteen persons employed at Reading when the contract was signed testified that they did not know or hear that the Machinists had interested themselves in organizing the plant until about a week after the contract was signed. It was stipulated that an additional thirteen employees would give similar testimony.

a conventional union shop clause and a dues check-off provision.

On June 9, 1955, approximately ten months after the 1954 contract was signed, but two months before it was renewed in a 1955 contract having the same union shop and dues check-off provisions, one Maryalice Mead[2] filed a charge of unfair labor practices against the Machinists and the Company; on August 5, 1955, she filed supplemental charges.[3] Each charge asserted the frustration of a free choice of the employees in the selection of a bargaining agent. On October 5, 1955, separate complaints were filed against the Union and the Company on the basis of these charges, and the complaints were consolidated for hearing and determination.

On August 30, 1955, the Union and the Company signed a new contract which included employees at an additional Bryan plant in a nearby town. Although the new contract had revised seniority provisions, was effective for a different term, and contained several other changes, it had a union shop clause and a dues check-off provision identical to those in the 1954 contract.

Between August 1954 and August 1955 the Company expanded its operation from 150 to 350 employees, and by November 1955 there were 480 persons covered by the contract. Each new employee hired was compelled to join the Machinists union within 45 days of being hired, and each signed an individual dues checkoff authorization. The Union does not challenge the finding that the identical union shop provisions in the 1954 and the 1955 con-

[2] She was employed by Bryan at the Reading plant from November 1953 until October 1955.

[3] The Board adopted the Trial Examiner's finding inter alia that, in the spring of 1955 "discontent at the Reading plant developed among employees who resented the way in which their right to self-determination had been thwarted when the IAM's [Machinists'] contract had literally been thrust upon them . . . ."

tracts were enforced during the period pertinent here, and that the dues of every employee were checked off under the respective provisions.

The Union now seeks review and the Board enforcement of an order and finding that both the Union and the Company violated the Labor Act[4] by maintaining and enforcing the union shop provision[5] and the dues checkoff agreement[6] in the two contracts. The Board held that such enforcement was an unfair labor practice because the basic contract was formally executed at a time when the Union did not represent a majority of the Company's employees. The primary issue presented on appeal is whether the Labor Act's statute of limitations[7] bars the Board from finding that these acts, *i.e.*, the enforcement

[4] National Labor Relations Act §§ 8(a)(1)-(3), (b)(1), (2), 61 Stat. 140 (1947), 29 U.S.C., §§ 158(a)(1)-(3), (b)(1), (2).

[5] "As a condition of employment, all employees covered by this agreement shall, forty-five (45) days after the date of execution of this agreement, or in the case of new employees forty-five (45) days after the date of hiring, become members of the Union, and remain members in good standing in the Union during the term of this agreement."

[6] "Upon receipt of a signed authorization of the employee involved, the Company shall deduct from the employee's pay check the initiation fee and dues payable by him to the Union during the period provided for in said authorization.

"Deductions provided for above shall be remitted to the financial secretary of the Union no later than the tenth day of the month following the deduction. The Company shall furnish the financial secretary of the Union monthly pay record of those for whom deductions have been made. . . ."

[7] National Labor Relations Act § 10(b), 61 Stat. 146 (1947), 29 U.S.C. § 160(b): "*Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

of the union shop and the monthly checkoff of dues, were unfair labor practices.

Our scope of review is limited to determining whether there is substantial evidence in the record as a whole to support the Board's findings of fact, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), and whether the Board has applied the statute in "a just and reasoned manner." *Gray* v. *Powell*, 314 U.S. 402, 411 (1941). Having in mind this limited scope of review, we are constrained to uphold the Board's conclusion.

If the alleged violation were the mere signing of the original contract in 1954 as distinguished from continuing and repeating its enforcement against employees, the Board's order would be invalid under § 10(b). It was rational, however, for the Labor Board to conclude that the violation charged was a continuing one, repeated anew each time the union security clause was enforced or dues checked off. Hence, the statutory period had not expired. *NLRB* v. *Gaynor News Co.*, 197 F. 2d 719 (2d Cir. 1952), *aff'd sub nom. Radio Officer's Union, AFL* v. *NLRB*, 347 U.S. 17 (1954); *Katz* v. *NLRB*, 196 F. 2d 411 (9th Cir. 1952). New employees were affected by the contract as they were employed. Each month up to and including the month when the charge was served, dues were deducted from the wages of each employee of the company, including Marvalice Mead, who filed the charge. Thus the contract provisions had a positive impact which was repeated regularly from time to time as to each employee.

It is contended that § 10(b) prevents the Board from relying on events occurring more than six months prior to service of the charge in order to prove a violation. The union security clause and the dues checkoff provision here involved were proper on their face. Therefore in order to show the illegality of enforcing these agreements, the Board was compelled to look back more than six months in order to show that the Union did not rep-

resent a majority of employees when the contract was signed. According to the Union and the Company, the Board may not do this. This issue raises questions on which authority is limited and no cases are precisely or directly in point.

In *NLRB* v. *Gaynor News Co.*, *supra*, the Second Circuit upheld a finding that it was a continuing violation for a company to enforce a union shop contract without first obtaining Board certification that a majority of employees had authorized such a contract. Under the then existing law no union shop contract was valid without such a certification.[5] In the case before us the Union and the Company would distinguish the *Gaynor News* case on the basis that there the absence of the required certificate was observable within the six-month period. There was no need in that case, they point out, to go back beyond the statutory period to demonstrate the illegality of enforcing the union shop clause. *Cf. NLRB* v. *Carpenters Local 1028, AFL*, 232 F. 2d 454 (10th Cir.), *cert. denied*, 352 U.S. 839 (1956). In the instant case no evidence from within the statutory period will serve to show *why* enforcement is illegal.

Section 10(b) is, however, a statute of limitations and not a rule of evidence. *NLRB* v. *Clausen*, 188 F. 2d 439, 443 (3d Cir.) *cert. denied*, 342 U.S., 868 (1951) (dictum). The established rule is that evidence of "transactions which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *FTC* v. *Cement Institute*, 333 U.S. 683, 705 (1948). This rule is, of course, subject to the important qualification that testimony as to such barred events may be received only as background

[5] National Labor Relations Act, § 8(a)(3), *Provided* (ii), 61 Stat. 140 (1947), *subsequently amended by* 65 Stat. 601 (1951), 29 U.S.C. § 158(a)(3), *Provided* (ii).

evidence and may not be given independent significance. See *Paramount Cap Mfg. Co. v. NLRB*, 260 F. 2d 109 (8th Cir. 1958). Put in another way, there must be acts occurring within the six-month period of sufficient status to constitute the violation charged, and evidence of acts outside the period can be received only to illuminate and explain the events within the period.

This brings us to the crux of the case: was the fact that the union did not represent a majority of Bryan employees when the contract was signed of such independent significance that its use in evidence is barred by § 10(b) or does this fact, in these circumstances merely serve to illuminate and explain the subsequent enforcement of the contract—an occurrence taking place within the statutory period?

The Board did not find here that the formal *execution* of the 1954 contract with its union security clause and its dues checkoff provision violated the act. It found rather that maintenance and enforcement of the 1954 contract was an unfair labor practice and further that the signing of the 1955 contract also constituted a violation.[9] Since a majority of the Bryan employees were

[9] The Board adopted the Trial Examiner's finding "that the 1955 agreement is a modification and extension of the 1954 agreement." The Examiner reasoned in the alternative, however, that "even if the 1955 agreement were to be considered a new agreement between different parties, the fact remains that any majority claimed by the Local Lodge at the time the 1955 agreement was entered into, which rests on the checkoff authorizations then in effect and secured pursuant to the 1954 agreement, clearly would have no validity in establishing an unassisted majority, under the holding of the Board" in Oliver Mach. Corp., 102 N.L.R.B. 822 (1953), *enforced*, 210 F. 2d 946 (6th Cir. 1954). It is unnecessary for us to pass on the validity of the finding that the 1955 agreement was only an extension of the 1954 contract; we accept the Trial Examiner's reasoning that, whether it was an extension of the 1954 contract, or whether it was a new and independent contract, its validity depends on conditions which prevailed on August 10, 1954.

members of the Union by the time the 1955 contract was signed, the illegality of the 1955 contract stems from the illegality of enforcing the 1954 contract for if enforcement of the 1954 contract was an unfair labor practice, the fact that the Union achieved majority status subsequent to its execution and as a direct result thereof does not remove the taint. Changes in status which result from unfair practices have been said by the Supreme Court not to affect the Board's power to restore the *status quo ante*. *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, (1944); see *Joy Silk Mills, Inc.* v. *NLRB*, 87 U.S. App. D.C. 360, 372, 185 F. 2d 732, 744 (1950), *cert. denied*, 341 U.S. 914 (1951).

The Board takes the position that evidence of the Union's lack of status when the contract was signed is not in and of itself the basis for its legal conclusions, but is used only to illuminate subsequent events, namely contractually compelled union membership and dues checkoff, these being events which occurred within the six months prior to service of the charges. In this situation, that distinction would seem to have validity because the unfair practices involved are positive acts which are both continuing and repeated. Only where the violations are of this character, *i.e.*, continuing and repeated, however, is it appropriate for the Board to rely on events outside the statutory period to establish a critical element of proof of the offense.

It seems to us this distinction is illustrated by *NLRB* v. *Pennwoven, Inc.*, 194 F. 2d 521 (3d Cir. 1952), and *NLRB* v. *Childs Co.*, 195 F. 2d 617 (2d Cir. 1952). Those cases hold that a discharge for union activities is not a continuing violation, that the employee's right to reinstatement and back pay is barred after six months from the date of discharge, and that the employer therefore does not commit a new unfair labor practice when he refuses reinstatement and back pay after the six months have

run. In those cases there was no affirmative action by the employer in the interim between discharge and demand for reinstatement which could support any concept of continuity.

In the instant case, however, the activity which the Board held was an unfair labor practice was the enforcement of the union security clause which was repeated each time a new employee was compelled to join the Union, and the enforcement of the dues checkoff provision which was repeated as to every employee each month. Here the activity charged as being illegal was continuing and repetitive, having a positive impact on the rights of employees every month, if not every day during which the contract was enforced. In such a case it is not unreasonable for the Board, charged with day to day administration of the Labor Act, to say that the facts relating to the genesis of the current illegal activity may be received in evidence even though the statutory period has run with respect to those generative facts. Where there is no continuity (as in *Pennwoven* and *Childs*), the original allegedly illegal act must, to have any effect at all, be given significance independent of the subsequent acts and cannot be received. This same distinction was drawn in *Katz* v. *NLRB*, *supra*, 196 F. 2d 411, 415 n. 5a (9th Cir. 1952), and in *NLRB* v. *United Hoisting Co.*, 198 F. 2d 465 (3d Cir. 1952), *cert. denied*, 344 U.S. 914 (1953); see *Superior Engraving Co.* v. *NLRB*, 183 F. 2d 783, 790 (7th Cir. 1950), *cert. denied*, 340 U.S. 930 (1951).

Another aspect of the *Pennwoven* and *Childs* cases serves to distinguish them from the instant case. In those cases, for the Board to have found an unfair labor practice within the statutory period, it would first have been required to make an express finding that another unfair labor practice had been committed outside the six-month period. The refusal to rehire would only be unlawful if the original firing constituted a violation of the Act or if the refusal were discriminatory. If the employee contends that the

current practice, *i.e.*, the refusal to rehire, is discriminatory, then the *fact* of the original firing may be used as supporting or background evidence. *Paramount Cap Mfg. Co.* v. *NLRB*, *supra*; see *NLRB* v. *Textile Mach. Works, Inc.*, 214 F. 2d 929 (3d Cir. 1954). The Board is prohibited, however, from making any legal conclusion with regard to events outside the statutory period. *American Fed'n of Grain Millers, AFL* v. *NLRB*, 197 F. 2d 451 (5th Cir. 1952). Although the Board in the instant case must look to the facts surrounding the making of the 1954 contract, its ultimate holding depends on their mere *existence* rather than on ascribing legal significance to those facts standing alone. In other words it is the *enforcing*, not the *signing*, of the contract which is the controlling evidence of the unfair practice.

Any other conclusion would permit an employer and a union to enter into what amounts to a collusive contract without consulting the wishes of a single employee, then sit back for six months before enforcing the membership or dues provisions of the contract and rely on § 10(b) of the Act to protect them from an unfair practice charge. This would defeat one of the basic purposes of the Act which was to insure that employees could select bargaining agents free from domination or coercion. Few things could be more productive of industrial tyranny than to permit employers and unions thus to dictate selection of bargaining agents without consulting employees. The Board's order is therefore clearly consistent with the spirit of the Labor Act and does not violate the letter of its statute of limitations.

There is another factor to be kept in mind in this case: in interpreting, applying, and administering a statute of limitations prescribed by Congress in this context, the Board—and the courts—are not confronted by precisely the same considerations as apply to statutes of limitations affecting the private rights of two individual liti-

gants. As part of a complex statutory scheme the problem the Board here deals with is far broader than the interests of two private litigants; the rights of an indeterminate number of working men and important rights of the public are also involved, all of this being part of what was thought to be a fairly, if not delicately balanced machinery to preserve collective bargaining equality between employers on the one hand and employees acting through freely and democratically chosen bargaining agents on the other. The Board may have thought that the interests of self determination outweighed otherwise important competing considérations of burying stale disputes. The dispute here involved is not the kind which buries easily but rankles at least once a month in the mind of those offended by being forced, as they see it, to pay tribute to an organization they had no really free choice in joining. We therefore uphold the Board's order under the authority of *NLRB* v. *Gaynor News Co., supra*, 197 F. 2d 719 (2d Cir. 1952), *aff'd sub nom. Radio Officers' Union, AFL* v. *NLRB*, 347 U.S. 17 (1954), and *Katz* v. *NLRB, supra*, 196 F. 2d 411 (9th Cir. 1952).

We turn now to the second phase of the attack made on the Board's order by the Union and the Company. The order requires the Union and the Company, jointly and severally, to reimburse the employees for the initiation fees and dues checked off pursuant to the contract. See note 6 *supra*. The Company argues, without challenge, that it merely checked off dues pursuant to a written authorization signed by each individual employee. It then passed the dues and the initiation fees to the Union as the contract required. While the Board found that the Company did not dominate the Union, it found that the Company accepted the Union's claim of majority status without ever questioning it and without asking for or seeing any proof to substantiate it. In addition it found that the Union's contractual position had been secured by agreement with the Company without regard to the wishes of the employees.

This same problem was recently presented to the Tenth Circuit, and that Court resolved it in accordance with the approach advocated by the Board.[10] The Tenth Circuit held that the Board's order "should stand unless there is a showing that the order is a patent attempt to achieve ends not designed to fairly effectuate the policies of the Act."[11] 261 F. 2d at 559. Accordingly, the Board's order is affirmed.

Petition for review in 14257 dismissed.
Petition for enforcement in 14324 granted.

FAHY *Circuit Judge dissenting:* The Board decision drew a dissent from Chairman Leedom and Member Murdock. It is set forth in the report of the case at 119 N.L.R.B. —— (1957) where the problem is analyzed in detail. I agree with the position of the Board dissenters, which may be synopsized in the following language from their opinion:

> [A]lthough an agreement invalid in its inception may continue to be invalid throughout its life, the fact of its invalidity and the consequent existence of unfair labor practices cannot be established merely by proof that the agreement was being maintained at some point in time subsequent to its execution, but can only be established by proof of the facts surrounding its execution in the past, which created the initial invalidity. When as here therefore, the charges are filed more than 6 months after the execution of the agreement, proof of its invalidity and the consequent unfair labor practices can only be established by reliance on evidence of events which occurred more than 6 months before the filing of the charge. This Congress expressly precluded by Section 10 (b).

[10] NLRB v. Broderick Wood Prod. Co., 261 F. 2d 548 (10th Cir. 1958).

[11] 261 F. 2d at 559, quoting Virginia Elec. & Power Co. v. NLRB 319 U.S. 533, 540 (1943).

It is well established that in making unfair labor practice findings the Board cannot rely solely on events which occurred more than 6 months before the filing of the charges, even though evidence as to such events is admissible for background purposes; and this is so even though the effect of such events continues to be felt within the 6-month period.

One of the principal purposes of a statute of limitations is to bring repose. As stated in *NLRB* v. *Pennwoven, Inc.*, 194 F. 2d 521, 524 (3d Cir. 1952), the rationale underlying such a statute is to prevent "people . . . being brought to book upon stale charges." Consistently with this, the period of limitations in the Taft-Hartley Act must have been deliberately adopted by Congress to aid in stabilizing labor relations by precluding adversary proceedings based on events which had laid dormant for six months. Under the decision of the court, however, there is no limit whatsoever to the time that might pass, with countless changes in the details of relations and obligations, without a complaint being barred, although proof of the true basis of illegality of the conduct complained of lies in the years that are gone. This seems to me inconsistent with the Congressional policy expressed in § 10(b).

We are not concerned now with the hypothetical case postulated by the court in which a collusive contract is not enforced for six months after its execution so as to evade the statute of limitations. I think that would present a different legal problem.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

No. 14,257

LOCAL LODGE No. 1424, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO; and INTERNATIONAL ASSOCIATION OF MACHINISTS AFL-CIO, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 14,324

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BRYAN MANUFACTURING COMPANY, *Respondent*.

On Petition to Review and Set Aside and on Petition to Enforce an Order of the National Labor Relations Board

Before: PRETTYMAN, Chief Judge, and FAHY and BURGER, Circuit Judges.

Judgment

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered by this court that in No. 14,257 the petition for review of the order of the National Labor Relations Board is dismissed; and

It is further ORDERED and ADJUDGED that in No. 14,324 the petition for enforcement of the order of the National Labor Relations Board in this case is granted and the order will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with this judgment.

PER CIRCUIT JUDGE BURGER.

Dated: February 27, 1959.

Separate dissenting opinion by Circuit Judge Fahy.

BRIEF FOR THE NATIONAL

WATER PLANNING BOARD

A CRITIQUE

FILE COPY

[redacted] 14

In the Supreme Court of the United States

OCTOBER TERM, 1949

LOCAL LODGE NO. [redacted], INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, AND BRYAN MANUFACTURING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
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Attorney,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No 780

LOCAL LODGE No. 1424, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, AND BRYAN MANUFACTURING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–13a) is not yet reported. The decision of the National Labor Relations Board (R. 325–461) is reported at 119 N.L.R.B. 502.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1959 (Pet. 14a–15a). The petition for a writ of certiorari was filed on March 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Within six months of the filing and service of the charges in this case, the Company and the Union required employees to join the Union as a condition of employment. The Board found that this conduct constituted an unfair labor practice. The Company and the Union predicated their defense to this unfair labor practice on a contract requiring union membership as a condition of employment, which contract was entered into over six months before the filing and service of the charges. The questions presented are:

1. Whether the Board was precluded by Section 10(b) of the Act (which precludes issuance of a complaint based upon any unfair labor practice occurring more than six months prior to the filing and service of the charge) from determining the validity of the contract asserted as a defense.

2. Whether the Board's order requiring the Company and the Union to reimburse the employees for dues and initiation fees checked off pursuant to the contract was valid and proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 15–17).

STATEMENT

1. In August 1954, the petitioners (International Association of Machinists and its Local Lodge 1424, herein jointly called IAM or the Union, and Bryan Manufacturing Company, herein called the Company) executed a contract under which the Company recog-

nized the Union as the exclusive representative of the Company's employees at Reading, Michigan. The contract also provided that all Reading employees had to join and remain members of the Union, and further provided that upon receiving "a signed authorization from the employee involved" the Company would deduct his union initiation fee and dues from his wages and pay them directly to the Union (R. 283–285). At the time the Company executed this contract, the IAM did not in fact represent any of the employees in the plant. Even the members of the Union's "Temporary Bargaining Committee" were selected at random by the Company and were not IAM adherents at the time (R. 151–155, 157, 209). After the contract was executed, however, the employees joined the Union in accordance with the contract's requirements. As several employees testified, they "had to," they "had no other choice" (R. 155–156, 113, 135, 203).

One year later, the Company and the Union renewed their contract in all material respects and extended it to cover a second plant, opened to relieve the overcrowded Reading plant, where employment had more than doubled during the year (R. 45, 187–188, 302–303, Pet. 5).

The Company and the Union have continually enforced the Union membership and checkoff provisions of the contracts, and every employee who has been with the Company 45 days or more has had his dues checked off to the IAM (R. 195, 255–256).

2. In June and August 1955, while the original contract was in effect, unfair labor practice charges were

filed and served alleging that the Company and the Union were requiring employees to join, and remain members of, the Union as a condition of employment, and that the contract, which purported to legitimize this conduct, was invalid (R. 260–262, 265–266). Following the customary proceedings, the Board, affirming the Trial Examiner, held that petitioners violated Section 8(a) (1), (2) and (3) and 8(b) (1)(A) and (2) of the Act (R. 430–437). Section 8(a) (1), (2), and (3) provides that employers may not coerce employees into union membership, or contribute support to labor organizations, or encourage union membership by discriminatory treatment of employees; and Section 8(b) (1)(A) and (2) provides that unions may not coerce employees into becoming members or cause employers to encourage union membership by discriminatory treatment of employees. In holding that petitioners violated these sections, the Board rejected the contention that petitioners had a lawful contract requiring union membership in accordance with the proviso to Section 8(a)(3) (*infra*, pp. 15–16). The Board held that the contract failed to meet the requirements of the statute as the Union did not represent any employees at the time it was executed, and that implementation of the contract was therefore violative of the Act (*ibid.*). In so holding, the Board, with two members dissenting, held that the six-months limitation proviso of Section 10(b) operated to prevent the Board from finding that the *execution* of the contract was an unfair labor practice but did not preclude the Board from relying on facts existing at the time the contract was ex-

ecuted to show that the contract was invalid and no defense to unfair labor practices committed within the six-months period.

The Board ordered the Company and the IAM to cease and desist from giving effect to their contract, and directed the Company to withhold recognition from the IAM, unless and until it was certified as the bargaining representative of the employees (R. 437–440). The Board further ordered the Company and the IAM to cease and desist from entering into, maintaining, or renewing any union security agreement, which failed to meet the requirements of Section 8(a)(3), and from in any like or related manner invading employee rights under Section 7 of the Act (*ibid.*). The Board also ordered both parties to stop giving effect to any checkoff cards, and jointly and severally to reimburse employees for any dues or initiation fees checked off pursuant to any agreement between the parties (R. 441–442).[1] Finally, the order directs both parties to post appropriate notices (R. 439–442, 457–461).

3. The court of appeals, with Judge Fahy dissenting, sustained the Board's order (Pet. 1a–13a). The court observed that, while the contract was executed outside the limitations period, its enforcement within the period by compelling employees to join the Union was an unfair labor practice cognizable by the Board,

[1] The Company's liability for reimbursement of dues and initiation fees commences December 10, 1954 (six months prior to the service of the charge upon the Company), and the Union's liability commences February 8, 1955 (six months before service of the charge upon the Union) (R. 442, 260–266).

for the six-month proviso creates a period of limitations, not a rule of evidence (Pet. 6a–7a). Noting that the compulsion of union membership was regularly repeated within the six-month period, the court held that the Board could look to events prior to the six-month period to determine whether conduct within that period was lawful (Pet. 8a). As the Board's order did not depend upon any legal conclusion with respect to events outside the statutory period, the court held that the Board did not violate the limitations proviso by drawing upon facts occurring over six months before the charge (Pet. 10a–11a). Finally, the court below sustained the Board's order directing the reimbursement of dues, noting, in agreement with the Tenth Circuit, that the order "should stand unless there is a showing that [it] is a patent attempt to achieve ends not designed to fairly effectuate the policies of the Act." *National Labor Relations Board* v. *Broderick Wood Products Co.*, 261 F. 2d 548, 559.

ARGUMENT

1. The holding of the court below that the Board could properly find that a contract, executed over six months before the charge, was invalid and furnished no defense to unfair labor practices committed within six months of the charge accords with the holdings of other courts and presents no important issue warranting review.

Petitioners do not deny that the contract when executed failed to satisfy the statutory requirements for such union security agreements. However, relying on Section 10(b) which provides that "no complaint

shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge," they contend that the Board is barred from finding invalid their union security agreement executed over six months before the charge. But the statute precludes the Board only from finding an unfair labor practice over six months before the charge; it does not preclude using evidence over six months old to establish violations within the six-month period. Here the violation—compelling employees to join the Union—occurred within six months of the charge, and the limitations proviso is therefore inapplicable. Petitioners, claiming that they could lawfully compel union membership under their contract, in effect urge it as a defense to what is otherwise a plain violation of the statute. Nothing in the limitations provision, however, prevents the Board from showing the invalidity of the contract asserted as a defense.[2]

This view of the limitations proviso has been adopted also in the only two other cases which have raised this problem in the twelve-year history of the amended Act. *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 722 (C.A. 2), affirmed, 347 U.S. 17; *Katz* v. *National Labor Rela-*

[2] In characterizing the contract as a "defense" we do not mean to imply that the burden of proving validity of the agreement is on the parties thereto. Admittedly the Board has the burden of establishing the facts which show that the agreement was invalid. In this case, however, the proof of invalidity (*i.e.*, lack of IAM majority at time of execution) is so overwhelming that petitioners conceded the point in the court below (Pet. 2a) and do not dispute it here.

tions Board, 196 F. 2d 411, 415 (C.A. 9).[3] See also *Paramount Cap Mfg. Co.* v. *National Labor Relations Board*, 260 F. 2d 109, 112–113 (C.A. 8). Contrary to petitioners' contention (Pet. 14–15), the decision in *American Federation of Grain Millers* v. *National Labor Relations Board*, 197 F. 2d 451, 454 (C.A. 5) does not conflict with the decision below. In *Grain Millers*, to have found an unfair labor practice within the statutory period, the Board would have had to make an express finding that another unfair labor practice had been committed outside the six-month period. See also *National Labor Relations Board* v. *Dallas General Drivers*, 228 F. 2d 702, 704 (C.A. 5). In both *Grain Millers* and this case, unfair labor practices were committed outside the statutory period, but in *Grain Millers* that legal conclusion was necessary to finding a violation within the period, whereas in this case no such legal conclusion need be drawn with respect to the earlier conduct.[4]

In trying to bring themselves within the "words" and "purpose" of the limitations proviso (Pet. 17), petitioners present the case as though the unfair

[3] Petitioners would distinguish those cases on the ground that the invalidity of the union security agreement was provable by a fact existing within the six-month period, namely, the lack of a certificate of authorization (Pet. 16, n. 4). This distinction, if such it be, is not reflected in the rationale of those cases. Assuming the distinction, the instant case stands as the only one to raise this issue.

[4] Petitioners suggest that the instant case is related to *National Labor Relations Board* v. *Fant Milling Co.*, No. 482, this Term (Pet. 13–14). No conflict is claimed; the relationship is merely that both cases concern the limitations proviso, but in widely different application.

labor practice found was the execution of the contract. In fact the unfair labor practice was the compelling of union membership within the six-month period, to which the invalid contract furnished no defense. The purpose of the limitations proviso was not to exclude evidence but to limit the period of liability. Compare *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705, referring to "the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." See also *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 443 (C.A. 3), certiorari denied, 342 U.S. 868;[3] *National Labor Relations Board* v. *General Shoe Co.*, 192 F. 2d 504, 507 (C.A. 6), certiorari

[3] The court in *Clausen* expressly approved the Board's holding in *Axelson Mfg. Co.*, 88 N.L.R.B. 761, 766, where the Board stated:

"* * * Section 10(b) enacts a statute of limitations and not a rule of evidence. It forbids the issuance of complaints and, consequently, findings of violation of the statute in conduct not within the 6 months' period. But it does not * * * forbid the introduction of relevant evidence bearing on the issue as to whether a violation has occurred during the 6 months' period. Events obscure, ambiguous, or even meaningless when viewed in isolation may, like the component parts of an equation, became clear, definitive, and informative when considered in relation to other action. * * * Congress can scarcely have intended that the Board, in the performance of its duty to decide the validity of conduct within the 6 months' period, should ignore reliable, probative, and substantial evidence as to the meaning and nature of the conduct. Had such been the intent it seems reasonable to assume that it would have been stated."

denied, 343 U.S. 904; *Paramount Cap Mfg. Co.* v. *National Labor Relations Board*, 260 F. 2d 109, 112-113 (C.A. 8); *National Labor Relations Board* v. *Brown & Root, Inc.*, 203 F. 2d 139, 145–146 (C.A. 8); *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 791 (C.A. 7), certiorari denied, 340 U.S. 930. Petitioners, in short, overlook the settled distinction between statutes of limitations, which preclude liability for past conduct, and ordinary principles governing the weight of evidence, under which remoteness in time affects probative value but not admissibility. Cf. *People* v. *Cuevas*, 18 Cal. App. 2d 151, 63 P. 2d 311, 312; *Purviance* v. *State*, 185 Md. 189, 44 A. 2d 474, 477–478.[6]

Petitioners' reliance on the legislative history of certain appropriation riders (Pet. 19–22) is equally unavailing. In the first place, petitioners concede (Pet. 24–25), and numerous cases establish,[7] that where the union shop agreement is invalid on its face, the Section 10(b) limitations period is inapplicable. Under the appropriation riders relied on by petitioners, however, the agreement would be immune to challenge even where its invalidity was patent.

[6] For this reason petitioners' alleged concern over the fate of collective bargaining agreements (Pet. 12–13), in an attempt to create an aura of importance around this unique situation, would appear to be insubstantial. As we have seen, this problem has not troubled either the Board or the courts. In general, existing union security contracts may be presumed to be valid, and the burden of proving their invalidity would rest on the Board, subject to ordinary rules of evidence concerning events remote in time.

[7] See, *e.g.*, *National Labor Relations Board* v. *F. H. McGraw & Co.*, 206 F. 2d 635, 639 (C.A. 6), and cases cited.

Thus petitioners' own concession, required by settled authority, establishes that the early appropriations riders on which they rely had far broader sweep than Section 10(b). Second, the petition overlooks the National Labor Relations Board Appropriation Act, 1948 (61 Stat. 276), which was enacted contemporaneously with the Taft-Hartley amendments. That Appropriations Act expressly provided that the limitations period was applicable only to contracts between an employer and a union representing a majority of his employees. That provision, added as a "rider" while the Appropriations Act was before the Senate Committee (cf. Pet. 20, n. 7), was the "rider to the current appropriations bill" which Section 10(b) rendered unnecessary (Pet. 19–20; see 93 Cong. Rec. 4499).* Thus, it is petitioners' contention, and not the Board's, which attributes absurdity to Congress (Pet. 22–23). Petitioners would have it that Congress at 61 Stat. 276 enacted an appropriations rider which granted immunity only to contracts executed with majority unions, and at 61 Stat. 136, 146, enacted a statute which granted immunity to contracts regardless of the union's majority status.

2. Having found that petitioners unlawfully compelled all the employees to join the Union as a con-

* The "rider" was introduced by Senator Ball, who was also a member of the committee reporting out the Taft-Hartley amendments. 93 Cong. Rec. 4499. When the latter committee referred to a "rider to the current appropriations bill" (Pet. 19–20), it presumably referred to the Ball rider: otherwise it would have referred to the then existing appropriations act (60 Stat. 698).

dition of employment, the court below held that the Board's remedy for the unfair labor practice, including the refunding of dues which the Company withheld from the employees and paid to the Union under the checkoff provisions of the contract, was within the Board's broad discretion. *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 539–540; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346–347. Petitioners' suggestion that this is a "recent innovation" (Pet. 33) is wide of the mark, as similar orders have been approved in a host of cases.* There is no conflict of authority and none is claimed.

Petitioners' contention (Pet. 33) that the reimbursement remedy is limited to cases of company-dominated unions has been rejected by every court of appeals which has considered the question. See cases in n. 9, *infra*; cf. *National Labor Relations Board* v. *Braswell Motor Freight Lines*, 213 F. 2d 208, 209 (C.A. 5); *National Labor Relations Board* v. *Shedd-Brown Mfg. Co.*, 213 F. 2d 163, 170–171 (C.A. 7). The validity of the reimbursement order turns on whether the employees were compelled to join the Union, not on whether the Union was "dominated" or merely "assisted." Similarly, petitioners' arguments that the employees derived benefits from union

* *Virginia Electric*, *supra*; *National Labor Relations Board* v. *Broderick Wood Products Co.*, 261 F. 2d 548, 558–559 (C.A. 10); *National Labor Relations Board* v. *Parker Bros. & Co.*, 209 F. 2d 278, 280 (C.A. 5); *National Labor Relations Board* v. *Local 404*, 205 F. 2d 99, 104 (C.A. 1); *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 57–58 (C.A. 4), certiorari denied, 321 U.S. 795.

representation and that some of them might have joined the Union voluntarily (Pet. 30–32) do not distinguish this case from the others in which this remedy has been judicially approved. Apparently petitioners would limit reimbursement to those employees who testified they felt coerced. But employee testimony on this issue would be of little worth (cf. *Radio Officers Union* v. *National Labor Relations Board*, 347 U.S. 17, 51; *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 231), and in any event the burden rested upon petitioners "to disentangle the consequences" of their unlawful conduct. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2), certiorari denied, 304 U.S. 576; see also *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. 2d 658, 663 (C.A. 2); *National Labor Relations Board* v. *Swinerton*, 202 F. 2d 511, 515–516 (C.A. 9), certiorari denied, 346 U.S. 814; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C.A. 3).

CONCLUSION

For the reasons stated above the petition for writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a)

of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h) * * *.

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

* * * * *

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated

agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

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FILE FOR THE

AMERICAN FEDERATION

OF LABOR AND CONGRESS

OF INDUSTRIAL ORGANIZA-

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INDEX

Citations

CASES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 44

LOCAL LODGE NO. 1424, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, AND BRYAN MANUFACTURING CO., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided in Rule 42 of the Rules of this Court.

The present case gives this Court its first opportunity to appraise the so-called *Brown-Olds* remedy[1] of the National Labor Relations Board. Typically, this remedy requires the

[1] The name comes from *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956), the first case in which the Board extended the mass refund remedy to a situation not involving a company-dominated or company-supported union.

reimbursement of all union dues and fees collected from employees pursuant to a union-security or hiring hall arrangement which the Board determines to be illegal. The practical implications of this new doctrine are staggering. Severe financial hardship, and in some instances financial ruin, is the imminent prospect for many locals affiliated with member unions of the AFL-CIO. Especially affected are unions engaged in the building and construction trades, and other unions operating hiring halls for employees. The AFL-CIO is therefore vitally interested in placing before this Court an outline of the scope of the *Brown-Olds* remedy and its impact on labor unions generally. Not all of the doctrine's ramifications are brought to the fore in this particular case. This is a further reason why the Federation has a special interest in demonstrating to the Court that the formulation and application of this remedy by the National Labor Relations Board, in this case and in many other similar cases for which the decision here might be controlling, is a patent abuse of administrative discretion.[2]

ARGUMENT

The Board's *Brown-Olds* remedy poses two related, but logically distinct, issues: first, the extent of the power pos-

[2] The Federation is no less interested in seeing the petitioners prevail in their contention that the six-month period of limitations contained in section 10(b) of the National Labor Relations Act bars the issuance of a complaint in cases such as this. We do not treat this issue, however, because we feel that its implications are amply exposed by the case before the Court, and that any arguments we might add to petitioners' would be merely cumulative. We fully endorse petitioners' view that the decisions of the Board and of the Court of Appeals below on this point subvert the philosophy of the limitations period as an instrument of repose, and that they fly in the face of the Congressional policy of "stabilizing labor relations by precluding adversary proceedings based on events which had laid dormant for six months." Fahy, J., dissenting below, *Local Lodge No. 1424, International Association of Machinists* v. *NLRB*, 264 F. 2d 575, 583 (D. C. Cir. 1959).

sessed by the Board to "support pivotal assumptions" with administrative "expertise alone,"[3] and secondly, the breadth of the discretion lodged with the Board to frame appropriate remedial orders. We submit that the *Brown-Olds* remedy stands condemned when viewed in either light.

The reimbursement remedy is not bottomed on reasonable inferences regarding the facts. It is based on a per se doctrine of inherent coercion, which is unsupported by and indeed contrary to historical and economic data, and which is accompanied by a blithe refusal by the Board even to consider direct evidence contradicting its fallacious assumptions. Furthermore, the remedy itself constitutes an abuse of the Board's discretion to frame appropriate orders. It amounts to a mechanical application of a formula that fails to take account of the infinite complexities of situations in the labor-management field. Its operation is oppressive and capricious, causing only slight inconvenience to some unions and financial ruin to others. Finally, the remedy is essentially punitive rather than remedial, being likened even by Board personnel to a "meat-axe" or a "big stick" with which to enforce Board mandates on hiring halls.

I. The Board's Brown-Olds Remedy Is Based On An Unreasonable Inference That All Union Dues And Fees Collected Pursuant To An Illegal Union-Security Or Hiring Hall Arrangement Constitute Coerced Payments.

A. Lack of Reasonable Basis or of Historical or Economic Data to Support Inference of Coercion

We do not contest the existence of the Board's power to draw "reasonable inferences from proven facts." *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 49. We do not contest the Board's right to use its "cumulative experience" in

[3] See *Harrell* v. *FCC*, 267 F. 2d 629, 632 (D. C. Cir. 1959).

fashioning a remedy, so long as there is exercised due "regard to circumstances which may make its application to a particular situation oppressive * * *." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349. At the same time we consider it beyond cavil that the Board cannot indulge in "mere conjecture" or "extravagant and unwarranted assumption." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 238. Board inferences are to be "reasonable," as this Court stated eight separate times in the course of four pages of its opinion in *Radio Officers, supra*, 347 U.S. at 49-52.

The legislative history of the Taft-Hartley Act emphasizes the concern of Congress that the courts should apply a check to any unreasonable inferences on the part of the Board. The role contemplated for reviewing courts under the 1947 amendments to section 10 of the National Labor Relations Act[4] was spelled out in the following terms in the House Conference Report:

> "* * * they [the courts] will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions."[5]

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[4] Sec. 10(e) of the original National Labor Relations Act, 49 Stat. 454, provided in part: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Sec. 10(f) was similarly worded.

Sec. 10(e) of the National Labor Relations Act, as amended, 61 Stat. 148, 29 U.S.C. § 160(e), provides in part: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Sec. 10(f) is similarly worded.

[5] H.R. Rep. No. 510, 80th Cong., 1st Sess., p. 56.

In *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956), the Board ordered a union to reimburse all dues and assessments collected under a closed-shop contract. Although the evidence disclosed only one named individual who had been discriminated against, the Board justified its sweeping order covering all employees with the flat assertion: "Dues and assessments here collected constituted the price these employees paid in order to retain their jobs." *Id.* at 601. Primary reliance for this decision was placed on *Virginia Electric and Power Co.* v. *NLRB*, 319 U.S. 533, where this Court approved a Board reimbursement order against a company in 1943.

Virginia Electric was a far different situation. Coloring every other aspect of the case was the fact that it involved a company-dominated union, "a type of organization," as expressly noted by this Court, "which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest." 319 U.S. at 544. The company-dominated union had entered a closed-shop and compulsory check-off arrangement with the company, whereby payments went "into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage." *Ibid.*

Mr. Justice Frankfurter, concurring in *Virginia Electric*, underscored the need for evidence of coerced payments in order to support the refund order. He distinguished *Western Union Tel. Co.* v. *NLRB*, 113 F. 2d 992 (2d Cir. 1940), where Judge Learned Hand had refused to enforce a reimbursement order even against a company-dominated union, on the ground that in *Western Union* "there was no evidence that all those [employees] who asked to have their wages stopped, did so in any part because they were coerced." 319 U.S. at 545, quoting 113 F. 2d at 997. In *Virginia Electric*, on the other hand, observed Mr. Justice Frankfurter:

> "* * * not only did it [the Company] foster that *company union, it foisted membership in the union upon all its employees.* The Board had a right to find that membership in the union, *which the employees had no power to reject,* equally denied the employees the power to reject the costs of that membership." 319 U.S. at 545. (Emphasis supplied.)

Thus, there were two salient factors in *Virginia Electric* which, taken together with the closed-shop and compulsory check-off arrangement, justified the Board's inference or conclusion that the employee payments were coerced:

1. The union was company-dominated. Congress, as the Court was aware, had recognized the evils of this institution. And labor history was replete with the shortcomings of company unions, with their impotence in times of stress and with their frequent betrayal of their members' interests.[6] It would be wholly reasonable under the circumstances of *Virginia Electric* to infer that the employees would not have associated with such a caricature of a union had they had unfettered choice, and to infer instead that membership was "foisted" on them.

2. The employees had no readily available means to reject the company-dominated union. Mr. Justice Frankfurter emphasized this fact in his concurrence. *Virginia Electric* was decided in 1943. Not until the Taft-Hartley amendments of 1947 was there a clear-cut method by which employees could secure "decertification" of a collective bargaining representative, or rescission of a collective bargaining representative's authority to make a union-security agreement with their employer.[7]

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[6] Millis and Montgomery, *The Economics of Labor: Organized Labor*, vol. III, pp. 879-886 (1945); Dulles, *Labor in America*, pp. 261, 277 (1949).

[7] See § 9 (c) and (e) of the National Labor Relations Act, as amended, 61 Stat. 144-145, 29 U.S.C. §159 (c), (e); H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 35.

Neither of these salient factors is present in this case, or in the usual case in which the *Brown-Olds* remedy has been applied.

In none of the cases in which the AFL-CIO is interested, of course, is there a company-dominated union. In *Brown-Olds* itself, and in most of the cases applying the mass reimbursement remedy, there has been no question about the legal status of the union as the representative of the majority of the employees on the job. It is true that the present case involves a union designated by less than half the employees on the job at the inception of the union-security arrangement. But as petitioners point out, in this case also the employees at all times had it within their power, by virtue of the 1947 Taft-Hartley amendment, to revoke their union's authority to make such a union-security agreement. These employees, like the employees in other *Brown-Olds* cases, were not lacking in the "power to reject" their union, as were the employees in *Virginia Electric*. Yet no "deauthorization" petition has ever been filed by the employees here involved.

The short of the matter is that only one premise could conceivably support the Board's inference that *all* dues and fees collected pursuant to an illegal union-security or hiring hall arrangement amount to coerced payments even when collected by a free, vigorous union not dominated by any company. That premise, which the Board has never seen fit to articulate, is simply this: No working man would join a labor union and pay dues to it unless he was compelled to do so by a union-security agreement.

To buttress this "extravagant and unwarranted assumption," the Board (so far as we know) has never deigned to cite a single historical study or a single economic survey. Indeed it could not. The whole history of the American labor movement stands ready to refute any such conten-

tion.[8] Working men join unions for mutual assistance, for social reasons, and for such financial benefits as group insurance and pensions; but primarily they unite to achieve bargaining parity with their employers. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209, Chief Justice Taft succinctly put the matter in perspective:

> "A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was neverthless unable to leave the employ and to resist arbitrary and unfair treatment Union was essential to give laborers opportunity to deal on equality with their employer."

Statistical data which the NLRB itself has published illustrate graphically the unreasonableness of the Board's inference of mass coercion. From 1947 to 1951, when the provision was repealed as unnecessary, a proviso to section 8(a)(3) of the National Labor Relations Act required

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[8] On workers' motives for organizing on both a local and national scale, see Commons and Associates, *History of Labor in the United States*, vol. I, pp. 169-184, 575-576 (1918), vol. II, pp. 43-48, 301-306 (1918), vol. IV, pp. 621-630 (1935); Millis and Montgomery, *The Economics of Labor: Organized Labor*, vol. III, pp. 354-359 (1945); Taft, *The A. F. of L. in the Time of Gompers*, pp. 1-13 (1957); Dulles, *Labor in America*, pp. 98-100 (1949). It is simply not the fact that a vague abstraction called a "union" coerces employees into membership, and tries to keep work from nonunion labor. Working men themselves have traditionally banded together and sought to prevent competition from cheap, substandard labor by means of the union shop or some analogous method for protecting their jobs and preserving craft standards. The experience of a hundred years attests this. Commons, *supra*, vol. I, pp. 596-600. As late as the 1930s laboring men in many industries had to prove their steadfastness to the principles of organization by running a grim gauntlet of employer goon squads, labor spies, and economic reprisals. See Millis and Montgomery, *supra*, vol. III, pp. 604-612; Rayback, *A History of American Labor*, pp. 343-344 (1959).

specific authorization by employees before their collective bargaining representatives could enter into union-security agreements. The following is a tabulation of the results of the Board's union-shop authorization polls during this period:[9]

Union-Shop Authorization Elections

Fiscal Year	Valid Votes	Votes for Union Shop	% for Union Shop
1947	1,629,330	1,534,980	94.2
1948	1,471,092	1,381,829	93.9
1949	900,866	805,189	89.4
1950	1,335,683	1,164,143	87.2

The inescapable conclusion is that the overwhelming majority of workers voluntarily embrace union conditions. In the light of historical experience and of the Board's own experience with these union-security authorization elections, any other inference, we submit, is patently "unreasonable" within the meaning of *Radio Officers, supra*, 347 U.S. at 48-52. The Board's finding that all employees in *Brown-Olds* cases have been coerced into paying dues is thus not supported by the "substantial evidence on the record considered as a whole" which is required by section 10(e) and (f) of the National Labor Relations Act.

B. The Board's Irrebuttable Inference; the Doctrine of Per Se Coercion

The Board has not rested content with drawing the unreasonable inference that all employees in *Brown-Olds* situations have been coerced into paying dues. It has proceeded to amplify the doctrine in subsequent decisions,

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[9] See NLRB Thirteenth Annual Report, p. 111 (1948); NLRB Fourteenth Annual Report, p. 172 (1949); NLRB Fifteenth Annual Report, p. 235 (1950); NLRB Sixteenth Annual Report, p. 306 (1951).

holding that an illegal hiring practice or unlawful union-security provision "inevitably coerced all employees • • • to become or remain members of the Union," *Saltsman Construction Co.*, 123 NLRB No. 142, 44 LRRM 1085, 1086 (1959), and "is sufficient in and of itself to establish the element of coercion in the payment of monies by employees • • • whether or not proof of actual exaction of payments is established," *Nassau and Suffolk Contractors' Assn.*, 123 NLRB No. 167, 44 LRRM 1138, 1139 (1959).

This doctrine of per se coercion has been carried to its logical conclusion. In *United States Steel Corp. (American Bridge Division)*, 122 NLRB No. 155 (1959), the Board applied the *Brown-Olds* reimbursement remedy against a union despite the fact that the remedy was never sought by the General Counsel at any stage of the proceeding and despite the fact that the Trial Examiner's Intermediate Report was favorable to the union. On April 3, 1959 the union filed with the Board, in NLRB Cases Nos. 4-CA-1514 and 4-CB-373, a motion to reopen the proceedings "to receive evidence as to employees who voluntarily paid dues and initiation fees to Respondent Union during the period in question and were not in fact required to do so in order to secure or retain employment with Respondent Company." (Motion for Modification, etc., para. 14.) On May 4, 1959, by direction of the Board, the Board's Executive Secretary entered an order denying the union's motion, "on the ground that nothing has been presented that was not previously considered by the Board." (Order Denying Motions, p. 2.)

The final step in this perversion of logic was taken by a Trial Examiner in *Lummus Corp.*, NLRB Case No. 4-CB-384, in an Intermediate Report on August 10, 1959. Faced with the threat of a *Brown-Olds* order, the union had made an offer of proof at the hearing before the Trial Examiner. The Intermediate Report described this offer as "primarily

in the form of testimony of members of the Respondent [Union] and financial statements, to establish that * * * union members were not coerced by the unlawful contract but instead paid dues and other fees to the Local voluntarily * * *." (Mimeo. copy, p. 8.) Citing *Nassau and Suffolk* and *Saltsman* for the proposition that "an unlawful exclusive hiring contract *inevitably* coerces employees," the Trial Examiner rejected the proffered evidence. *Ibid.* (Emphasis in the original.)

The full dimensions of the *Brown-Olds* doctrine now stand revealed.[10] Upon the *a priori* proposition that workers would not join unions but for the existence of union-security arrangements, a proposition plainly at variance with history and recent empirical data, the Board and its Trial Examiners have erected a per se doctrine of "inevitable coercion" of dues payments. And they have insulated their jerry-built structure from any contact with the disturbing world of reality by refusing even to consider evidence which would contradict factually the conclusions reached through their unreasonable inferences.[11]

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[10] We of course realize that the Court will only decide this case on the record before it. The process of decision should be enhanced, however, by viewing this particular situation in its proper setting of general Board policy. Furthermore, the NLRB itself undoubtedly regards the *Brown-Olds* remedy as a definitive formula of general application. Consequently, if the Court in this case should reach the issue of the dues reimbursement award, its decision would almost certainly have far-reaching implications regarding the whole refund doctrine. Thus it seems appropriate that the Court should be aware of the proportions this doctrine has assumed.

[11] The Board has introduced inconsistency into its reasoning by allowing itself the luxury of contemplating at least a segment of reality in situations where such indulgence would not disturb its *a priori* rules for applying the *Brown-Olds* remedy. Thus, in *Anchorage Businessmen's Assn.*, 124 NLRB No. 72 (1959), the Board refrained from invoking the refund order where a union-security contract was invalid merely because of a technical violation of the filing requirements of section 9(f), (g), and (h) of the National Labor Relations Act. The Board said it would not re-

No apology is made by the Board for this approach. In the brief for the NLRB filed in June, 1959 in *Local 357, International Brotherhood of Teamsters* v. *NLRB*, No. 14,794 (D.C. Cir.), it is stated:

> "And, in any event, the propriety of the Board's reimbursement order manifestly is not defeated because some employees may have made these payments voluntarily. • • • For the Supreme Court has declared that where the 'inherent effect' of union or employer conduct is coercive, as here, not even the subjective evidence of employees to the contrary will avail the wrongdoer." (Brief for the NLRB, pp. 50-51.)

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quire reimbursement for this reason, and for the additional reason that "all the pharmacists in the area had joined the Independent before the execution of the union security contract and therefore must be presumed to have paid the initial dues and fees voluntarily, rather than under the compulsion of such contract." 44 LRRM 1453, 1457.

Yet in *United States Steel Corp. (American Bridge Division)*, discussed *supra*, p. 10, the union sought in vain to reopen the proceedings with the averment, inter alia, "that many employees had paid dues in advance of their employment by Respondent Company in accordance with past practice extending over many years and for reasons other than to secure or retain employment with Respondent Company • • •." (Motion for Modification, etc., para. 12.)

And in *Saltsman Construction Co.*, 123 NLRB No. 142, 44 LRRM 1085, 1086 (1959), the Board declared: "We do not agree [with the Trial Examiner] that the remedy of reimbursement should be limited to those employees who became members of the Union after beginning employment. • • • the illegal practice • • • inevitably coerced all employees • • • to become or remain members of the Union."

Perhaps not without significance as a key to the present Board's philosophy is the fact that, just two years before the Board initiated in *Brown-Olds* its doctrine of per se coercion of union dues payments, it repudiated a line of its own decisions which had held that employer interrogation of employees concerning their union affiliation or activities was per se unlawful. *Blue Flash Express, Inc.*, 109 NLRB 591, 593 (1954), expressly overruling *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358 (1949).

Cited as a basis for this assertion are this Court's decisions in *Radio Officers Union* v. *NLRB*, 347 U.S. 17, and *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219. We feel that these decisions, fairly considered, refute rather than support the Board's contentions.

In *Donnelly Garment* the Board had been instructed by a Court of Appeals to admit and consider testimony by a company's employees that they had voluntarily organized and joined a union which the Board had charged was company-dominated. After a painstaking examination, this Court concluded that the Board had in fact obeyed the mandate of the Court of Appeals, even though the Board was left still convinced that the union was company-dominated. At no point did this Court suggest that "subjective evidence" was not a factor. Indeed it expressly noted that it was "not called upon to lay down a general rule of materiality regarding such testimony." 330 U.S. at 231. And of course *Donnelly* involved the admissibility of testimony regarding a union alleged to be company-dominated.

Radio Officers, we grant, upholds the power of the Board to draw "reasonable inferences from proven facts," without the necessity in every instance of having "subjective evidence of employee response." 347 U.S. at 49, 51. But nowhere is there any indication that the Board is authorized to draw an inference in splendid disregard of proven fact. Nowhere is there any indication that the Board may make such an inference irrebuttable by refusing even to consider proffered testimony in contradiction of it. Especially pertinent on this point are the words of Mr. Justice Frankfurter, concurring in *Radio Officers* in an opinion in which he was joined by Mr. Justice Burton and Mr. Justice Minton:

> "But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence

which may be adduced, and which the Board *must* take into consideration. The Board's task is to weigh *everything* before it, including those inferences which, with its specialized experience, it believes can fairly be drawn." 347 U.S. at 56-57. (Emphasis supplied.)

The "reasonable inference" standard endorsed by the Court in *Radio Officers*, and supplemented by the view of the three concurring Justices that an inference is subject to rebuttal by other evidence, thus clearly stands athwart the headlong course of the Board's per se doctrine of mass coercion.

Per se doctrines of National Labor Relations Act violations are nothing novel. And neither is repudiation of them by this Court. In *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409, the Court struck down the Board's attempt to brand an employer's bargaining for a management functions clause as "per se an unfair labor practice," where the evidence viewed as a whole did not show that the employer refused to bargain in good faith. The Court commented that "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." 343 U.S. at 410. This healthy skepticism about substituting per se doctrines for a considered evaluation of the facts in each case seems even more appropriate in instances involving fancied coercion of dues payments by all the employees in a bargaining unit.

II. The Board's Brown-Olds Mass Reimbursement Order Is An Inappropriate Remedy, Not Adapted To Particular Circumstances, Oppressive In Its Operation, And Not Calculated To Effectuate The Policies Of The Act.

A. Oppressive and Capricious Operation of the Remedy

The Labor Board abuses its discretionary power in framing remedial orders unless they are "appropriate" and

"adapted to the situation calling for redress." *NLRB* v. *District 50, United Mine Workers*, 355 U.S. 453, 458, 463; *NLRB* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333, 348. Accordingly, even assuming that the Board's underlying inferences supporting the *Brown-Olds* remedy were reasonable, it would still be necessary for the Board to justify the appropriateness of the remedy itself as a means of exercising its discretionary power under the National Labor Relations Act. Board orders cannot be applied "mechanically"; they must take "fair account * * * of every socially desirable factor in the final judgment." *Phelps-Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198. With these fundamental principles set forth we will not burden the Court with a repetition of the legal arguments fully explored by the petitioners in their brief. We will confine our attention principally to data showing the oppressive and capricious operation of the *Brown-Olds* remedy.

To the best of our knowledge, as of August 1, 1959 a *Brown-Olds* type of remedy had been applied in about thirty final orders issued by the National Labor Relations Board.[12] The files of the AFL-CIO contain relatively detailed information regarding the estimated financial effect on eleven of the unions which have been subjected to this remedy. This supplies a sample of about one-third of the total. The following is a tabulation of the estimated amounts involved in these eleven instances:

[12] This does not include any of the numerous Intermediate Reports in which Trial Examiners have recommended the imposition of the *Brown-Olds* remedy. Furthermore, although the *Brown-Olds* case itself was decided in 1956, the remedy did not become one to be applied generally until November 1, 1958. This was the final deadline allowed unions and contractors by the Board's General Counsel to achieve conformity in their hiring arrangements with the standards enunciated by the Board in *Mountain Pacific Chapter, Associated General Contractors*, 119 NLRB 883 (1958). See letter of the NLRB's General Counsel, dated August 19, 1958 (5 CCH Lab. Law Rep. ¶50,103).

Brown-Olds Awards

Estimated Amount of Award[13]	Size of Union Treasury Affected
Unions with approximately 500 members or less	
$75,000	$80,000
$ 750	$34,000
$50,000	$ 3,000
Unions with approximately 500–1000 members	
$ 1,550	$100,000
$30,000–$50,000	$ 50,000
Unions with approximately 1000–1500 members	
$282,000	$155,000
$5	"Very small"
$300,000–$400,000	$113,000 (cash) $425,000 (total assets)
Unions with approximately 1500 members or more	
$15,000	$60,000
$ 7,000	$98,000 (cash) $245,000 (total assets)
$ 6,000	$96,000

[13] In all of these cases there are either Motions for Reconsideration pending before the National Labor Relations Board or Petitions for Enforcement or Review pending in the courts. Consequently, the amounts of money which would be involved if the mass reimbursement orders should be enforced can only be estimated. The estimates are the best calculations possible on the part of union attorneys and officials on the basis of the formulas supplied by the Board or by its regional offices in compliance conferences.

The Board introduced the possibility of a vast multiplication of these sums in the future with its announcement of the following formula in *Nassau & Suffolk Contractors' Assn.*, 123 NLRB No. 167, 44 LRRM 1138, 1139 (1959): "In cases involving multiemployer contracts in which the contracting union and one or more employers are named respondent parties to the contract, the Union's liability for reimbursement of sums unlawfully exacted also shall extend to all employees covered under such contract . . . ."

The following is a tabulation of the relationship between the estimated amounts of these awards and the union treasuries affected:

Awards substantially greater than treasury	2
Awards approximately equal to treasury	3
Awards substantially smaller than treasury	5
Award of insignificant amount	1
	11

Of the eight unions affected which have less than 1500 members, five of them are threatened with awards which would wipe out their treasuries and which in two cases would place them many thousands of dollars in debt. Two of the three unions having memberships of 500 or less are so affected. The three large unions with memberships of 1500 or more are severely inconvenienced but in no instance is their treasury wiped out. The impact of the *Brown-Olds* remedy, as might be anticipated, falls most heavily upon the smaller unions least able to sustain it.

In section 1, paragraph 3 of the National Labor Relations Act the Congress set forth as one of the findings upon which it grounded the policies and provisions of the Act:

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by * * * restoring equality of bargaining power between employers and employees."

Nothing could more effectively destroy the balance of bargaining power between employers and employees, expressly stated by Congress to be a fundamental purpose of the National Labor Relations Act, than the continued application of this pernicious Board doctrine which could easily strip of financial resources or drive deeply into debt

nearly half the unions it affects. Seemingly forgotten has been the warning of this Court that the Board may not apply "a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349.

The very range in the size of awards (from $5 to $300,000 or $400,000) in these cases suggests one of the capricious aspects of the mechanical application of this massive refund remedy. Numerous factors having no intrinsic relationship to the supposed evil of the union-security provision or hiring practice sought to be eradicated will be decisive on the amount of the resulting *Brown-Olds* award. The same union-security provision or hiring arrangement will ordinarily be used by a union on a number of jobs in a particular locality. Yet the amount to be reimbursed in a given case will be determined by the duration of the particular job concerning which a complaint is issued, by the number of men working on that job, and by the length of time required to process the case through the Board and the courts.

Characteristic of the mechanical operation of the *Brown-Olds* remedy is the Board's failure to take any account of the legality of union-shop provisions under the proviso to section 8(a)(3) of the National Labor Relations Act. Under this proviso, in all states not having "right-to-work" laws, a legitimate collective bargaining representative can enter into an agreement with an employer requiring union membership as a condition of employment after the thirtieth day following the beginning of employment. Accordingly, even assuming arguendo that an employee is coerced into joining a union by a closed-shop provision or discriminatory hiring practice, the union "[a]t most * * * may have collected only 1 month's dues in excess of those to

which it was equitably entitled"[14] under a valid union-security provision. So far as the men on the job are concerned—and these are the only ones covered by the refund order—this is realistically the sole injurious effect of a closed-shop arrangement. The Board utterly refuses to face up to this fact. It imposes the *Brown-Olds* remedy so as to require the reimbursement of all dues collected from the beginning of employment (insofar as the six-month limitations period allows) until the end of the job.

A further capricious effect of this doctrine has been described by a Board Trial Examiner even while utilizing it:

> "*Brown-Olds* is a meat-axe remedy applied in meat-axe fashion. • • • inequities are inherent in applying *Brown-Olds*. One of these is that it is left to the charging party to determine whether all or only one or more of equally guilty contracting parties will be held liable for reimbursement."[15]

The nature of this particular problem is strikingly illuminated by a trio of charges involving the International Typographical Union. In *News Syndicate Co., Inc.*, 122 NLRB No. 92 (1959), discrimination was alleged by two employees, one at the New York Daily News and the other at the Wall Street Journal. The first employee charged both

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[14] Board Member Peterson, dissenting in *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594, 607 (1956). If no union shop or no union at all is what the employees want, a deauthorization or decertification petition is always available. See note 7 and related text, *supra*, p. 6.

[15] *Ingalls Steel Construction Co.*, NLRB Case No. 15-CA-1174 (1959) (Intermediate Report, mimeo. copy, p. 10).

The AFL-CIO believes neither employers nor unions should be subjected to these unrealistic and oppressive refund orders. However, the Board has taken the pains to suggest in its brief in *NLRB v. News Syndicate Co.*, No. 25,496 (2d Cir.), that an employer on whom the remedy is imposed could have a claim over against the union. (Brief for the NLRB, p. 35, n. 27.)

the employer and the union while the second employee charged only the union. In *Honolulu Star-Bulletin, Ltd.*, 123 NLRB No. 51 (1959), the employees alleging discrimination chose to charge only the employer and not the union. In each instance, of course, the Board imposed the *Brown-Olds* remedy only against the party which was charged. With financial disaster for a union or even a marginal employer thus hinging on the caprice of the individual charging party, there is all the more reason to question whether a remedy of this nature can be said in any genuine sense to effectuate the policies of the Act.

B. Punitive Use of the Remedy

As we have already indicated, the Board's *Brown-Olds* remedy is based upon an unreasonable inference unsupported by and contrary to proven fact, and rendered irrebuttable by the Board's rejection of any offer of contradictory evidence. We have also demonstrated the oppressive and capricious effect of this remedy in actual operation. Why then has the Board increasingly resorted to its use?

We do not think that the Board can or will deny that the primary purpose of the *Brown-Olds* remedy is to enforce the Board's strictures on union-security and hiring hall arrangements. Specifically, its principal role is to enforce adherence to the three guarantees which, in the now-discredited decision of *Mountain Pacific Chapter, Associated General Contractors*, 119 NLRB 883 (1958),[18] the

[18] On August 28, 1959 the Court of Appeals for the Ninth Circuit refused to enforce the Board's order. *NLRB* v. *Mountain Pacific Chapter, Associated General Contractors*, No. 15,966. The court declared it "patent that a contract which is fair on its face is not unlawful in and of itself simply because it does not contain clauses prohibitory of illegal action." 44 LRRM 2802, 2806. While upholding the Board's capacity "to say that it will give peculiar weight to certain evidence," the court refused to let the Board

Board declared would have to be explicitly included to make valid any agreements establishing exclusive referral systems.

On February 7, 1958 the General Counsel of the Board frankly advised unions and contractors in a letter:

> "The purpose of the Board in applying the so-called *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by, among other things, prevailing upon employers and unions to correct their illegal hiring arrangements." (5 CCH Lab. Law Rep. ¶ 50,060.)

In an address at the Southeast Trade Exposition on March 21, 1959, the General Counsel expressly linked the *Mountain Pacific* doctrine to the *Brown-Olds* remedy, commenting:

> "The subsequent history of the *Mountain Pacific* decision has been, in large part, a concerted program by this Agency to encourage appropriate affirmative action by the contracting parties to conform their collective agreements and hiring practices to the requirements of *Mountain Pacific*. In this respect, the major

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hold as a matter of law that a hiring hall contract "which omitted certain prohibitory stipulations was per se invalid and contrary to law." *Id.* at 2807. The Court of Appeals in effect struck down the Board's attempt in *Mountain Pacific* to operate on the same basis on which it is trying to operate in the *Brown-Olds* situations, viz., on the basis of per se doctrines rather than reasonable inferences of fact. *Id.* at 2805-2807. This Court itself has noted that "the Board has no general commission to police collective bargaining agreements • • •." *Local 1976, Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 108.

The Board has indicated that it will apply the *Brown-Olds* reimbursement remedy if a contract fails to meet the *Mountain Pacific* standards even though the contract is otherwise valid on its face and even though there has been no showing that the contract has been discriminatorily enforced against any particular employees. *Los Angeles-Seattle Motor Express, Inc.*, 121 NLRB No. 205 (1958); *News Syndicate Co.*, 122 NLRB No. 92 (1959). Formerly, refund orders were entered by the Board only where specific individuals had been found to be coerced into paying fees and dues. See, e.g.,

spur has been the so-called *Brown-Olds* remedy. • • • *deterrence is the underlying consideration* • • •" (Mimeo copy, pp. 5, 8; emphasis supplied.)

At the Rutgers University Conference on September 30, 1958 the General Counsel picturesquely emphasized the punitive nature of the *Brown-Olds* remedy and the coercive use made of it by the Board:

> "• • • this extraordinary remedy • • • demonstrates vividly the capabilities of administrative pressure and persuasion. • • • over the heads of the parties hung this statutory sword of Damocles—the constant awareness that *Brown-Olds* would be applied in full. • • • President 'Teddy' Roosevelt • • • carried a 'big stick' and with it he went far. We spoke softly and carried a 'big sword,' and the results to date have been heartening." (Mimeo. copy, pp. 6, 8.)

Sharply contrasting with the decisions of the Board and the words of its General Counsel is the unqualified statement of this Court that the Board's "power to command affirmative action is remedial, not punitive." *Consolidated*

Local 404; International Brotherhood of Teamsters, 100 NLRB 801 (1952), enforced 205 F.2d 99 (1st Cir. 1953). In *Nassau and Suffolk Contractors' Assn.*, 123 NLRB No. 167, 44 LRRM 1138, 1139 (1959), the Board expressly overruled two of its prior decisions in holding that the reimbursement remedy "is applicable to all closed shop and exclusive hiring hall agreements, which do not provide the safeguards set forth in the Mountain Pacific decision, 119 NLRB 883, whether or not proof of actual exaction of payments is established."

Of the system, in itself, by which a union serves as the instrumentality for referring workers to prospective employers for jobs, the Court of Appeals for the Ninth Circuit in its *Mountain Pacific* decision said simply: "The hiring hall is legal and has always been held so." 44 LRRM at 2805, citing *NLRB* v. *Swinerton*, 202 F.2d 511 (9th Cir. 1953), *cert. den.* 346 U.S. 814; *Eichleay Corp.* v. *NLRB*, 206 F.2d 799 (3d Cir. 1953); *Del E. Webb Construction Co.* v. *NLRB*, 196 F. 2d 841 (8th Cir. 1952); *Hunkin-Conkey Construction Co.*, 95 NLRB 433 (1951).

Edison Co. v. *NLRB*, 305 U.S. 197, 236; *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 12. In *Republic Steel*, as if anticipating the arguments advanced on behalf of the Board's policy of "deterrence" during the past two years, the Court supplied a blunt refutation:

> "* * * it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." 311 U.S. at 12.

In a word, the *Brown-Olds* remedy, both in its underlying assumptions and in its actual application, is opposed to reason, to history, to empirical data, to Congressional policy, and to the pronouncements of this Court.

CONCLUSION

For the foregoing reasons and for the reasons stated in the brief for petitioners, the judgment of the Court of Appeals should be reversed with directions to set aside the order of the National Labor Relations Board.

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